(29,986)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1923**

## No. 676

THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD CO., APPELLANT,

*vs.*

THE UNITED STATES OF AMERICA AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

APPEAL FROM THE COURT OF CLAIMS

INDEX



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1923

[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. B—234

THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD CO.

vs.

THE UNITED STATES OF AMERICA and JAMES C. DAVIS, Director General of Railroads

I. HISTORY OF PROCEEDINGS

On October 11, 1922, the plaintiff filed its original petition.

On December 9, 1922, the defendant filed a demurrer to said petition.

On April 9, 1923, the demurrer was argued by Mr. Sidney F. Andrews, for the defendant, and by Mr. S. S. Ashbaugh, for the plaintiff.

On April 30, 1923, the court entered the following order and memorandum:

ORDER SUSTAINING DEMURRER

This cause coming on to be heard was submitted upon the demurrer to the petition and was argued by counsel. On consideration whereof the court is of opinion that the demurrer is well taken.

It is therefore adjudged and ordered that the defendant's demurrer be, and the same is hereby, sustained, and the petition is dismissed.

MEMORANDUM

The court's conclusion is based upon the considerations:

(1) That the jurisdiction of the Court of Claims in cases such as this is conferred by section 3 of the Federal control act, 40 Stat. 451 It provides for action by a board of referees and authorizes an agreement by the President with the carrier, and "failing such agreement" suit may be brought to determine the amount of just compensation. In the suit thus authorized the report of the referees is prima facie evidence of the amount of compensation and of the facts stated therein. The facts averred in the petition fail to show that the condition precedent contemplated by the statute has been complied with so as to bring the case within the jurisdiction of this court.

(2) That if the court have jurisdiction, the agreement, Exhibit A to the petition, concludes any rights the plaintiff might otherwise have.

[fol. 2] II. AMENDED PETITION—Filed June 15, 1923, by Leave of Court

Comes now the plaintiff, the St. Louis, Kennett & Southeastern Railroad Company, and for cause of action alleges:

1. That the St. Louis, Kennett & Southeastern Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, and as such corporation has for a long time been and now is engaged in business as a common carrier of freight and passengers for hire both in the State of Missouri and as interstate commerce, and at all times hereinafter mentioned was [fol. 3] so engaged in intrastate and interstate commerce, with its office and principal place of business at Kennett, Missouri.

That said James C. Davis is now the duly appointed, qualified, and acting Director General of Railroads, and as such is made a party defendant herein.

2. That under the power granted by the act of Congress, approved August 29, 1916, the President of the United States, on December 26, 1917, issued his proclamation and thereby took possession and control of the railroads of the United States, including this plaintiff and all its transportation facilities and business, for the purpose of more effectually prosecuting the war with Germany, and immediately appointed a Director General of Railroads, who took possession and control of the plaintiff, its railroad facilities and business, and operated the same down to and including the 29th day of June, 1918. That the issuing of said proclamation, the taking possession and control of said railroads, and of this plaintiff, the appointment of said Director General of Railroads and his operation and control thereof were all approved by the act of Congress of March 21, 1918, known as the Federal Control Act.

That on the 29th day of June, 1918, the Director General of Railroads issued a relinquishment notice to the plaintiff in this case, whereby he pretended to relinquish the possession and control of this plaintiff, its railroad facilities and business, which said notice was received by this plaintiff on or about the 1st day of July, 1918, and whether said notice was valid or void in law the said plaintiff on said 1st day of July acted upon the same as legal and binding and thereafter and from and including said 1st day of July, 1918, the officers of said plaintiff operated the railroad of the plaintiff in ac- [fol. 4] cordance with the provisions of the Federal Control Act, and the further provisions of section 204 of the Transportation Act approved February 28, 1920.

3. That under and by virtue of the proclamation and order of the President so issued and made effective on January 1, 1918, this plaintiff and all its railroad facilities and business, its income receipts, expenses of operation and control, became and were under the direct orders of the Director General of Railroads, and all were so operated in accordance with the proclamation of the President and the several provisions of the law applicable thereto, and the defendants be-

came liable for the operation and control thereof, for the cost and maintenance of said operation, and for a just compensation therefor, during said period of operation and control from January 1 to July 1, 1918, as provided by the Federal Control Act; and that the plaintiff and the President of the United States were unable to agree upon the compensation to be paid the plaintiff for the use of its property, franchises and railroad facilities, and have since been unable to agree thereon, and have not at any time made any agreement touching the same.

That ever since the 1st day of March, 1920, when the period of Federal control ceased by operation of law, the Director General has refused to acknowledge and has denied his liability for the operation and control of the plaintiff's railroad, its facilities and business, during said six months from January 1 to July 1, 1918, and has refused to pay the costs and expenses of operation thereof, and to pay any compensation accruing to this plaintiff by virtue of the operation and control of its lines and business during said period of six [fol. 5] months, and still refuses to acknowledge his liability and to pay the costs of operation or any loss sustained thereby, and to pay this plaintiff any rental or compensation for the use, operation, and control of said railroad, its business and its property during said period so designated.

4. That, pretending to act under and by virtue of the Proclamation so issued by the President and by virtue of the provisions of the Federal Control Act and by virtue of his own authority, more completely to control the business theretofore conducted by said plaintiff and more completely to control and direct the business of this plaintiff and to transfer the same to other lines of railroad then under his control and operation, the Director General, by virtue of his power and influence over the business of the plaintiff operated in connection with lines of railroad then in his operation and control, advised and in effect forced and compelled this plaintiff to accept and sign a contract then known as a co-operative contract for short-line railroads, under date of February 19, 1919, a full, true, and correct copy of which contract (omitting signatures) is hereto attached, marked Exhibit A, and made a part hereof.

That said contract was arranged, drawn, and constructed entirely by the Director General, and contained such provisions as he demanded, and did not express a fair and equal agreement on the part of this plaintiff, but was accepted by its officers for the purpose of saving for themselves as much of their former business as possible, and as an alternative submitted by the Director General, and was signed for this purpose only, and not otherwise, and for the supposed concessions set out in sections 5 and 6 thereof, and for nothing else whatsoever.

[fol. 6] That by this contract the Director General pretended to say, and pretended to compel the plaintiff to accept as a fact, that this railroad was not taken under Federal control by the President's Proclamation, but was subjected to Federal control by virtue of the

Control Act of March 21, 1918, thus attempting to create a situation already created by law.

That by sections 5 and 6 of said contract the Director General pretended to agree and guarantee that the rates, fares, and charges in force on January 1, 1918, should remain in force as to the plaintiff's business, and that an equitable allotment of cars should be granted, and that the per diem rentals then in force should remain, or that they might be established from time to time as the Director General saw fit, and then provided that the only consideration therefor, or for any requirement inserted by the Director General in said contract, was the agreement found in sections 8 and 9 thereof that the plaintiff might, as far as practicable, have the right to use the purchasing agencies of the Director General in the purchase of materials and supplies at the prices which the Director General shall pay therefor, and that the plaintiff might have its repairs done at the shops of the connecting railroads then under the control and operation of the Director General and at fair prices fixed by him. No other or further consideration of any kind or nature whatsoever was included in said contract so drawn and required by the Director General, and no other further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto. The plaintiff gained nothing by the execution of this contract, and by it no rights were lost.

That by section 11 of said contract the Director General pretended [fol. 7] to rescind and set aside the notice of relinquishment issued on June 29, 1918, and to take the plaintiff and its properties again under control and operation of the Federal Control Act, and that the whole contract, so far as it was legal and valid, was pretended to be made effective as of April 1, 1918, although from and after July 1, 1918, the Director General never at any time exercised any control or operation over this company or its properties, but from and after July 1, 1918, the plaintiff was controlled and operated entirely by its own officers.

That the whole of said contract always was and now is wholly null and void for the reason that the same was prepared and executed by the Director General without any power or authority so to do, and is in many parts in direct violation of law then in full force and effect in attempting to create a relation already created by law and different than that provided therein; that no consideration was created therein or intended to be created therein for the use and benefit of the plaintiff; that no consideration was given or created in favor of the plaintiff even in sections 5, 6, and 9 thereof, as the same were then matters of law, or in section 8 thereof, where the right was controlled by the Director General, and that section 3 thereof does not contain and was not intended to contain any receipt or acknowledgment of any consideration by or in favor of the plaintiff for the use of said railroad property during said six months from January 1, to July 1, 1918, and refers only to the provisions of said sections 5, 6, 8 and 9 of said contract.

5. That during said period of six months from January 1, to July 1, 1918, because of the control and operation of said railroad and

its properties and because of the control and diversion of its traffic [fol. 8] and business by the Director General, the plaintiff sustained a loss or deficit in its operating income in not less than the sum of $12,065, which the Director General has refused to pay or reimburse.

That during said period and because of said control and operation the plaintiff has sustained a further loss in the under maintenance of its equipment, and by reason of the failure of the Director General adequately to provide for the proper maintenance of the ways and structures of the said railroad company in the further sum of $6,800, which has not been repaid.

That during said period the plaintiff suffered a further loss by reason of the Director General having failed and refused to furnish the necessary supplies and materials used in the operation of said railroad in the further sum of $1,944, which has not been repaid.

That during said period the plaintiff was entitled to the fair rental value of said railroad and its equipment and assets so taken, controlled and used by the Director General, as a just compensation guaranteed by law, in the sum of $46,800, no part of which has been paid.

That the several amounts above enumerated are justly due the plaintiff, and that due demand was made for the same on the President and the Director General; but that the President and the Director General, although often solicited so to do, failed to agree with the plaintiff upon the amount of reimbursement so claimed to be due, and failed to agree upon any amount whatsoever as just compensation because of the taking, control and operation of said property, as alleged, and refused and still refuses to pay any amount whatsoever for said losses, as above demanded.

[fol. 9] 6. That after the Director General had so refused to pay said claims or any part thereof, the plaintiff applied to the Interstate Commerce Commission for the appointment of a Board of Referees as provided by law, which application was granted, and a Board of Referees of three members was duly appointed, before whom this plaintiff duly presented its claim as above set forth. That said Board of Referees duly heard said claim, and on June 14, 1922, decided the same and rejected the demands of the plaintiff. A full, true, and correct copy of said decision as promulgated by said board is filed herewith as part of the files in this case, from which finding and decision the plaintiff now appeals to this court and asks that this appeal be heard and decided as provided by law.

That the plaintiff is the owner of said claim, and no assignment or transfer of said claim or any part thereof or interest therein has been made, and the plaintiff has at all times borne true allegiance to the Government of the United States.

Wherefore the plaintiff prays for a judgment in the sum of $67,609, and for such other and further relief as is provided by law.

S. S. Ashbaugh, Attorney for Plaintiff. G. B. Webster, Of Counsel.

[fol. 10] Jurat showing the foregoing was duly sworn to by H. B. Pankey omitted in printing.

"EXHIBIT A" TO AMENDED PETITION

Agreement

This Agreement made this 26th day of February, 1919, between the Director General of Railroads (hereinafter called the Director General), acting on behalf of the United States and the President, under the powers conferred on him by the Proclamation of the President, hereinafter referred to, and the St. Louis, Kennett, and Southeastern Railroad Company, a corporation duly organized under the laws of the State of Missouri (hereinafter called the Company):

Witnesseth that

(a) Whereas by a Proclamation, dated December 26, 1917, the [fol. 11] President, acting under the powers conferred on him by the Constitution and Laws of the United States, by virtue of the joint resolutions of the Senate and House of Representatives, bearing the date April 6 and December 7, 1917, respectively, and particularly by virtue of Section 1 of the Act of Congress approved August 29, 1916, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession of and assumed control at 12 o'clock noon on December 28, 1917, for war purposes of certain railroads constituting a system or systems of transportation (not including the railroad of the Company described herein) and appointed William G. McAdoo Director General of Railroads; and

(b) Whereas the Act of Congress called herein the Federal Control Act, approved by the President March 21, 1918, brought under Federal control the railroad hereinafter described under the following provision, "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act;" and

(c) Whereas by Proclamation, dated March 29, 1918, the President, pursuant to the said Federal Control Act authorized the said William G. McAdoo, as Director General, either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to make with the carriers or any of them, such agreements as may be necessary and expedient [fol. 12] respecting any matter concerning which it may be necessary or expedient to deal and to make any and all contracts, agreements or obligations necessary or expedient in connection with the Federal control of such railroads as fully in all respects as the President might do; and

(d) Whereas the said William G. McAdoo has resigned as Director General of Railroads, and by a Proclamation dated January 10, 1919,

the President appointed Walker D. Hines Director General of Railroads and authorized him, either personally or through such divisions, agencies, or persons as he may appoint, in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to make with the carriers, or any of them, the agreements, contracts, or obligations aforesaid:

Now, therefore, the parties hereto, each in consideration of the agreements of the other herein contained, do hereby covenant and agree to and with each other as follows:

Section 1. (a) This agreement shall be binding upon the United States, the Director General and his successors, and upon the Company, its seccessors and assigns, * * *.

This agreement shall not be construed as creating any right, claim, privilege, or benefit against either party hereto in favor of my State or any subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) Wherever in this agreement the words Director General are used, they shall be understood as designating the person who has been, or may from time to time be appointed by the President to exercise the powers conferred on him by law with relation to Federal control.

Section 2. The Company's said railroad affected by this agreement shall be considered as including the following roads and properties:

The Railroad of the St. Louis, Kennett, and Southeastern Rail-[fol. 13] road Company, extending from Kennett, Missouri, to Piggott, Arkansas, a distance of twenty miles, more or less, with all branches and tracks, trackage, bridges, and terminal rights, all lines owned by or leased to and operated by the company and all other property of the company with the appurtenances thereof.

Section 3. (a) The Company accepts the terms and conditions of said Federal Control Act and the terms of this agreement, and expressly accepts the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to.

This is not intended to affect any claim said Company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act.

(b) The Company, on its own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by it in this agreement or lawfully imposed upon it by or pursuant to the Federal Control Act.

Section 4. It is expressly agreed and understood that the possession and use of the railroad property herein described subject to the right of the Director General to take the said property into actual possession as hereinafter provided, as a war emergency shall remain in the Company, and the Company shall continue to operate the same, and

all revenues accruing from the operation thereof shall belong to the Company, and all expenses arising out of or incident thereto, and [fol. 14] all taxes of whatsoever character imposed thereon, or upon the Company shall be paid and borne by the Company, it being expressly agreed that unless and until the Director General shall as a war necessity take over the actual possession and operation of said railroad he assumes no obligation for the payment of any expenses or charges in connection therewith, nor of any risk or accident in connection with the operation or control of said property.

Section 5. All rates, fares, and charges for transportation services performed jointly by the Company and any transportation system in the possession of, and operated by, the Director General shall be divided fairly between the Director General and the Company. It is agreed that the arbitraries and percentages of joint rates, both passenger and freight, received by the Company as of January 1, 1918, shall not be reduced, and whenever joint rates have been or shall be increased, the Company shall receive as its proportion of such increased joint rates amounts in the same ratio as its arbitraries or percentages bore to the joint rates before they were increasd.

Section 6. The Company shall receive an equitable allotment of the cars (and, where feasible, motive power) in the possession or under the control of the Director General. For the equipment thus furnished it shall pay the per diem rentals now in effect or as they may be established from time to time by the Director General, and like rentals shall be paid by the Director General to the Company for any of the Company's equipment used by him: Provided, however, That there shall be a time or reclaim allowance to roads of 100 miles or less in length of two days, which will be assumed by the delivering road.

Section 7. If differences arise as to any matter arising under this contract, either party may refer the question to the Interstate Commerce Commission, and its decision shall be final and binding.

[fol. 15] Section 8. The Company, so far as practicable, shall have the right to use the purchasing agencies of the Director General in the purchase of materials and supplies at the prices which the Director General shall pay therefor, and to have its repairs done in the shops of its connecting lines to the same extent and upon the same terms as were enjoyed before Federal control; where roads have heretofore not had the repairs done at the shops of the connecting line, but at private shops which have since been closed, they may have their repairs done at the shops of the connecting line upon fair terms.

Section 9. There shall be no discrimination against the Company in the matter of publishing tariffs and routing. In all publication of rates, tariffs, and routing, covering the territory in which the Company's road is situated, the Company shall be treated in the same manner as the trunk lines, except that nothing in this section shall be construed to require the establishment of joint rates where joint rates were not in effect at the commencement of Federal control.

Section 10. It is expressly agreed that if in the opinion of the Director General a necessity shall arise making it necessary or desirable for any purpose connected with the war, for the Director General to take into his own hands the possession, control, and operation of

said railroad and the properties herein described, he shall have the right to do so. In such event this contract shall be terminated and a new contract made providing for the payment of compensation as provided by the Federal Control Act; and if in the meantime it becomes necessary in his opinion to issue any orders or directions to said Company affecting the movement of troops or war supplies, said Company shall obey such orders or directions.

Section 11. In view of the foregoing covenants and agreements, and subject thereto, the order of relinquishment issued on the 29th [fol. 16] day of June, 1918, is hereby rescinded and set aside as of the date when the same was issued; and the said railroad and the properties herein described are hereby brought fully within the terms and under the control of said Federal Control Act, the same in all respects as if the said order of relinquishment had not been issued. This contract shall become and be effective as of April 1, 1918, with the same effect as if it had been executed and delivered on said date.

Section 12. The Director General will formulate definite rules and regulations governing exchange transportation, which rules and regulations shall be made applicable to the Company without discrimination.

Section 13. The Company shall furnish to the Railroad Administration a statement on forms supplied by the Director General, which shall show the total amount and character of competitive freight, in tons, which was handled by the Company during each of the seven months, April 1st to October 31st, inclusive, for the years 1915, 1916, 1917, and 1918, and the revenue thereon which accrued to the Company; also such detailed information as is possible to supply as to the freight traffic which it is claimed was diverted during the period April 1, 1918, to November 1, 1918, chargeable to the Director General's operation. If the analysis of this statement shows loss by diversion of competitive freight traffic and does not show any abnormal conditions as to the amount of freight traffic which are not fairly chargeable to the Director General's operation, the Company shall receive in cash the difference between the total revenue on competitive freight traffic for the seven months' period of 1918, and the average revenue for the seven corresponding months during the test period of 1915, 1916, and 1917, less the out-of-pocket cost to the Federal-controlled lines for transporting the diverted freight traffic, which shall be considered to be 33¼ per [fol. 17] cent of the gross revenue to the Company on such diverted freight traffic.

In the event the Company shall show that it has suffered from the diversion of competitive freight traffic between March 21, 1918, and April 1, 1918, it shall be reimbursed as provided herein.

For the purpose of this agreement, competitive freight traffic is defined as freight traffic moving over the particular short-line railroad involved, destined beyond its termini, or moving from, to, or between points on the Company's line of railroad, which could be handled at equal rates from point of origin to point of destination via the line or lines of some carrier or carriers, one or all of which are under Federal control.

Beginning on November 1, 1918, such arrangements shall be made for the routing over the Company's line of competitive traffic as shall insure to the Company in any month the same proportion of such competitive traffic as it had of the total of such traffic for the average of the three years, counting the calendar years of 1915, 1916, and 1917, taking into account both class and quantity of tonnage, it being understood and agreed that if in any month such proportion of competitive traffic delivered to the Company shall be less than that based on the average for the three-year period, the Director General will, within 60 days after the close of any such month, deliver such additional amount of competitive traffic as shall make up the required amount.

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[fol. 18] III. Demurrer to Amended Petition—Filed June 26, 1923

The United States of America and James C. Davis, Director General of Railroads, by the Attorney General of the United States, demurs to the amended petition filed herein upon the following grounds, to wit:

(1) Facts alleged in the amended petition do not constitute a cause of action within the jurisdiction of this court.

(2) Facts alleged in the amended petition do not show that the plaintiff is entitled to any relief as against the defendants or either of them.

(3) Facts alleged in the amended petition show a complete settlement and satisfaction of any and all claims plaintiff had or could have had against the United States or the Director General of Railroads under the Federal control act or on account of anything done or omitted to be done by the United States of America or the Director General of Railroads in respect to the matter set forth in plaintiff's amend*ed* petition.

(4) If, as alleged, the contract of settlement was executed by plaintiff under duress, or through fraud or mistake, plaintiff must first proceed in a court of equity to have same set aside before he can proceed in this court to have ascertained the compensation, if any, he is entitled to,

Robert H. Lovett, Assistant Attorney General. Dwight E. Rorer, Attorney. A. A. McLaughlin, General Solicitor R. R. Administration. Sidney F. Andrews, General Attorney R. R. Administration.

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[fol. 19] IV. Argument and Submission of Demurrer

On October 22, 1923, the demurrer to the amended petition was argued and submitted by Messrs. A. A. McLaughlin and S. F. Andrews, for the defendant, and by Mr. S. S. Ashbaugh, for the plaintiff.

V. Order Sustaining Demurrer—Entered November 5, 1923

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's petition as amended, and the court being of opinion that the plaintiff is not entitled to recover doth hereby sustain said demurrer, and the plaintiff's petition as amended is dismissed.

See Memorandum at the former hearing.

By the Court.

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VI. Judgment of the Court—Entered Nov. 5, 1923

At a Court of Claims held in the City of Washington on the 5th day of November, A. D., 1923, judgment was ordered to be entered as follows:

This case was submitted upon defendant's demurrer to plaintiff's amended petition, on consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore oredred, adjudged and decreed that the defendant's said demurrer to the plaintiff's amended petition be sustained, and that the amended petition be and the same is hereby dismissed.

By the Court.

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[fol. 20] VII. Plaintiff's Application for Appeal—Filed Nov. 12, 1923

Comes now the plaintiff above named on this 12th day of November, 1923, and makes application for and gives notice of an appeal to the Supreme Court of the United States from the judgment heretofore entered herein on November 5, 1923, sustaining the defendant's demurrer to the plaintiff's amended petition and dismissing said amended petition.

S. S. Ashbaugh, Attorney for Plaintiff.

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VIII. Order of Court Allowing Application for Appeal—Entered November 19, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 21] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer to the amended petition; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Twentieth day of November, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,986. Court of Claims. Term No. 676. The St. Louis, Kennett & Southeastern Railroad Co., appellant, vs. The United States of America and James C. Davis, Director General of Railroads. Filed December 3, 1923. File No. 29,986.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

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## No. 230,

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THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

*vs.*

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

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APPEAL FROM THE COURT OF CLAIMS.

---

## BRIEF ON BEHALF OF APPELLANT.

---

S. S. ASHBAUGH,
*Attorney for Appellant.*

G. S. WEBSTER,
*Of Counsel.*

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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1924.**

## No. 229.

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THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

*vs.*

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

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APPEAL FROM THE COURT OF CLAIMS.

---

## BRIEF ON BEHALF OF APPELLANT.

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### Statement of the Case.

This is an appeal from the Court of Claims sustaining a demurrer to the petition for the adjustment of losses sustained by the appellant during that portion of the period of Federal Control for the first six months of the year 1918, when the appellant was under the control of the Director

General of Railroads of the United States. An application had been made to the Interstate Commerce Commission for the settlement of the claim for the losses sustained by the appellant in the sum of $67,609.00, being the items set out in the complaint in Section 5 of the petition found on pages 4 and 5 of the Record.

Upon the petitions filed in the Court of Claims two hearings were had. At the first hearing the Court sustained a demurrer to the petition on the ground of lack of jurisdiction appearing in the allegations of the petition. No opinion was filed, but the Court entered the following memorandum:

> "The court's conclusion is based upon the considerations:
>
> "(1) That the jurisdiction of the Court of Claims in cases such as this is conferred by section 3 of the Federal Control Act, 40 Stat. 451. It provides for action by a board of referees and authorizes an agreement by the President with the carrier, and 'failing such agreement' suit may be brought to determine the amount of just compensation. In the suit thus authorized the report of the referees is *prima facie* evidence of the amount of compensation and of the facts stated therein. The facts averred in the petition fail to show that the condition precedent contemplated by the statute has been complied with so as to bring the case within the jurisdiction of this court.
>
> "(2) That if the court have jurisdiction, the agreement Exhibit A to the petition, concludes any rights the plaintiff might otherwise have."

In accordance with the rules of the Court an amended petition was filed complying as far as possible with the

suggestions of the Court in the memorandum. To this amended petition the defendants refiled their former demurrer. It appeared at the second hearing that the Court had sustained the first ground of demurrer at the former hearing because it was assumed by the Court that the order of the Board of Referees should have been referred to the Interstate Commerce Commission, and the appeal should be taken from the order of the Commission. When this, however, was corrected by introducing the statute showing that the appeal should be taken from the order of the Board of Referees, the Court directed the argument to proceed as to the meaning of the contract set out as an exhibit to the plaintiff's petitions. Upon the final argument at the second hearing the Court sustained the defendants' demurrer as shown by the order and judgment of the Court set out on page 11 of the Record. From this judgment sustaining the demurrer and dismissing the petition the plaintiff duly appealed, which appeal was by the Court allowed, as shown on page 11 of the Record.

The case was filed in this Court on December 3, 1923, and is here for consideration.

**Assignment of Error.**

The Court below erred in sustaining the defendants' demurrer to the plaintiff's amended petition, and in dismissing said petition from the Court.

**The Issue Involved.**

Under the ruling of the Court below no issue as to the four items of losses sustained by the plaintiff as alleged in Section 5 of the petition set out on pages 4 and 5 of the

Record, is now before the Court, but the sole issue is as to the meaning of the contract set out as Exhibit "A" to the petitions and found beginning on page 6 of the Record.

Is Section 3 of this contract a receipt in full for all losses and damages sustained by the plaintiff as alleged in Section 5 of its petition? Section 3 of the contract is a part of a contract executed by both parties to this action containing 13 sections beginning on page 6 and ending on page 9 of the Record.

It is the contention of the appellant that this contract must be considered as a whole, must be all construed together, and that it in nowise referred to or included any item of loss or damage sustained by the plaintiff below and set out in Section 5 of the petition, but that Section 3 refers to and includes only such items as are referred to in specific sections of the contract. This is the exact allegation made in the petition in reference to Section 3 of the contract, and which allegations on demurrer are assumed to be true, and should have been taken into consideration by the Court below, and a trial held upon the validity of such losses and damages.

On the contrary it is held by the defendants that Section 3 of the contract is a receipt in full for all losses and damages sustained during the period of Federal control by the railroad company, and that such waiver prevents the appellant from the recovery of its losses and damages so set out in its petition.

The sole question, then, before this Court is the meaning and effect of Section 3 of this contract which the Court held to be an acknowledgment of payment in full, or a waiver of the losses and damages for the items set out in Section 5 of the petition.

## ARGUMENT.

### I.

### Jurisdiction of the Court Below.

It was alleged in the demurrer to the petition and to the amended petition that the Court below had no jurisdiction under the allegations contained. Anticipating that this claim may also be urged in this Court, some attention must be given to it, although the Court below at the second hearing overruled the first ground of demurrer, took jurisdiction of the case, and decided the demurrer on the ground that the petition did not allege facts sufficient to constitute a cause of action.

The jurisdiction of the Court below in this class of cases was conferred by the Federal Control Act of March 21, 1918, 40 Stat. 461, Paragraph 3115¾a, Compiled Statutes, 1918. Section 3 of this Act provides that claims against the Government growing out of the taking of the railroads for war purposes under the Act of August 29, 1916, 39 Stat. 645, might be settled by agreement between the President and the railroad company and payment might be made for such claims. This Section further provides that if the President or the Director General, to whom the power to make such agreement had been given, shall fail to agree with the railroad company upon the validity or the amount of such claims, a Board of Referees shall be appointed by the Interstate Commerce Commission, which Board should hear the claims and report its findings to the parties. The statute then specifically provides as follows:

> "Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

The petition properly alleged the nature of the claims; that the Director General failed to agree with the plaintiff as to the amount due; that the Interstate Commerce Commission had appointed a Board of Referees before whom the claim was presented; that the Board of Referees filed a report thereon dated June 14, 1922, and that by virtue of this finding the plaintiff filed its petition in the Court of Claims. No objection was made in the demurrer that all material allegations were not included in the petition, but it was alleged by the defendants that under the statute above quoted the Court had no jurisdiction of the subject matter of the claim because the Board of Referees failed to find any amount due the plaintiff.

It appeared from the argument of counsel for the defendants in support of this ground of the demurrer that if the Board of Referees had found any amount whatever due the plaintiff, then either party, or in fact both parties, might appeal to the Court of Claims for a hearing upon the report filed with the parties and upon the original claim filed before the Director General.

The Court below, however, it was learned at the second hearing, took the view that the report of the Board of Ref-

erees should have been filed with the Interstate Commerce Commission, and the appeal taken from the refusal of the Commission to allow the claim. This, however, was not the statute, and it appeared at the second hearing that the first ground of the demurrer was not well taken. It was then assumed by the Court that whatever the finding of the Board of Referees might be, either party dissatisfied with such report might file their petition in the Court of Claims and demand a hearing thereon. The Court below did not take the view expressed by counsel for the defendants that if the Board of Referees found nothing due, that no appeal would lie to the Court of Claims. The Court did not take the view that if the Referees found a million dollars due the plaintiff, the Director General might appeal, but if the Board of Referees found that nothing was due, then no appeal would lie under the same statute.

All of this, however, was corrected by the Court in taking jurisdiction of the case and sustaining the demurrer at the second hearing referred to. The statute is so plain that no further discussion need be entered into as to the jurisdiction of the Court below.

II.

**Admissions on Demurrer.**

It will be noticed by the Court that the claim under consideration was not within or growing out of the contract which was set out as an exhibit to the petition in the Court below. The claim is specifically set out in Section 5 of the petition beginning at the bottom of page 4 of the Record, and includes four items of loss and damage which it was alleged by the appellant should be settled by the Director General and about which no agreement was reached.

On page 5 of the Record it is alleged that the plaintiff sustained a loss during the period of Federal Control because of deficit in operating expenses in the sum of $12,065.00.

It is further alleged that there was a loss during the period of Federal Control because it was not provided with proper maintenance of the ways and structures in the sum of $6,800.00.

It is further alleged that there was a further loss by not furnishing the necessary supplies and materials used in the operation of the railroad during said period in the sum of $1,944.00.

It is alleged that there was a further loss in refusing all compensation for the use of the railroad during said period in the sum of $46,800.00 all amounting to the sum of $67,609.00, for which demand is made because all payment was refused by the Director General.

The nature of the contract set out as an exhibit to the petition is described in Sections 1, 2, 3, and 4 of the petition beginning on page 2 of the Record, and after such description it is said in Section 4 of the petition, repeated on page 4 of the Record, that

> "No other or further consideration of any kind or nature whatsoever was included in said contract so drawn and required by the Director General, and no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto. The plaintiff gained nothing by the execution of this contract, and by it no rights were lost."

It is thus shown that this action did not arise out of the contract or because of anything contained in it, but the

contract was set out as an exhibit to the petition not as a part thereof, but merely for the purpose of showing to the Court that the cause of action set out in the petition, and the items of losses and damages set out in Section 5 thereof, were entirely independent of and arose outside of the contract itself, and to show to the Court that no provision contained in the contract referred to any of these losses or damages, and that Section 3 did not and could not apply to these losses and damages, and that the demurrer admitted that there was no consideration covering these losses and damages included in or even remotely referred to by Section 3 of the contract.

Upon the demurrer the Court overlooked the fact that the claim was founded upon losses and damages not included in the contract, and overlooked the fact that this allegation of the petition expressly averred that "no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto." The demurrer admitted this fact, and the Court erred in applying to such a claim so specifically plead an allegation in an outside document which was made an exhibit to the petition for the sole purpose of showing that the claims sued on were not included within the contract. The Court below should have heard the testimony upon the claim sued on, and then if the defendants had been able to prove that the items in the claim had been at some time, and somehow, and for some amount, settled and paid for, then the Court might on final hearing have rendered judgment in favor of the defendants. But on the petition containing the allegations above set out the Court erred in applying a contract covering other

things and other items and which contract it is admitted by the demurrer did not include the items in suit and which were not referred to in any provision in the contract.

## III.

### The Nature of the Contract.

The contract which the Court below construed to be a settlement of the claims set out in the petition contains thirteen sections beginning on page 6 of the Record. Sections 1 and 2 seem to allege that the railroad company was not taken under Federal control, not because it was different than other railroad companies, but simply because the Director General denied the application of the statute to this class of railroads. These sections, however, may pass out of the discussion because whatever view may have been somewhat laboriously expressed by the Director General when he drew this contract, nevertheless the decision of this Court in the case of the *Northern Pacific Railway Company et al. vs. North Dakota,* 250 U. S. 135, forever settled the question that these roads were taken under Federal control, and were subject to the Constitution and the laws made and in force under such conditions.

Section 3 of the contract contains the pretended waiver and receipt in full which the defendants claim bars the right of recovery in this case.

Section 4 contains some allegations about the war emergency and other similar conditions which have no application to the present issue.

Section 5 provides that all fares, rates, charges, and divisions which were in force on January 1, 1918, shall be maintained, and if any increases in the amounts received should

be granted the plaintiff should be allowed to participate therein.

Section 6 provides that the plaintiff shall receive an equitable allotment of cars and shall be allowed the same amount of free time for loading and unloading as was then in force, which was then the amount of two days for such purposes.

Section 7 provides that any difficulty arising between the parties might be referred to the Interstate Commerce Commission, and the decision shall be final and binding.

Section 8 provides that the plaintiff might have the privilege, if so desired, of purchasing supplies or maintaining repairs under the same conditions as allowed to other railroads.

Section 9 provides that no discriminations shall be made against the plaintiff in the matter of publishing tariffs and routing.

Section 10 provides that if the Director General should so determine, he should have the right to take into his own hands the possession, control, and operation of the railroad and the properties therein described.

Section 11 provides that relinquishment notice issued by the Director General on the 25th day of June, 1918, was rescinded and set aside as of the date when the same was issued, and that the said railroad and its properties were brought within these terms and under the control of the Federal Control Act. It further provides that the contract dated on the 26th day of February, 1919, should be made the same effect as if it had been executed and delivered on retroactive and be made effective as of April 1, 1918, with that date.

Section 12 refers only to the Director General making and formulating definite rules and regulations governing the ex-

change transportation, which rules shall be made applicable to the company without discrimination.

Section 13 provides that the company shall furnish the Director General with the usual reports required by the Interstate Commerce Commission, and such reports as might be required, but why any reports referred to in said section regarding the amount of freight handled by the company during the years 1915, 1916, 1917, and 1918, and the revenue therefrom which should have accrued to the company should be required, and why the amount of freight traffic which the company should claim was diverted during the period from April 1, 1918, to November 1, 1918, in view of the claim now set up as to the meaning of Section 3, is beyond all human comprehension. Why the Director General included these provisions in Section 13, if when he read Section 3 he knew that full settlement had been made for all losses and damages, is beyond human imagination.

If Section 3 was included in this contract for the purpose of showing a complete settlement for all losses and damages as now alleged by the demurrer and claimed by the Director General, why any or all sections of this contract should have been written excepting a receipt in full, is also beyond human comprehension.

## IV.

### The Date of the Contract.

The contract shows on its face that it was executed on the 26th day of February, 1919. In Section 11 it is stated that:

> "This contract shall become and be effective as of April 1, 1918, with the same effect as if it had been executed and delivered on said date."

Section 3 does not provide that it shall be retroactive, but it is stated as follows:

> "This is not intended to affect any claim said company may have against the United States for carrying the mails or for any other services rendered not pertaining to or based upon the Federal Control Act."

The contract in Section 1 (b) recognized the fact that the Federal Control Act was passed March 21, 1918.

Section 13 further provides that under certain conditions specifically named the plaintiff "shall receive in cash the difference between the total revenue on competitive freight traffic for the seven months' period of 1918," which seven months the section further says are "the period April 1, 1918, to November 1, 1918."

Section 13 further provides as follows:

> "In the event the company shall show that it has suffered from the diversion of competitive freight traffic between March 21, 1918, and April 1, 1918, it shall be reimbursed as provided herein."

These specific dates all set out in the contract show on their face that Section 3 was not intended by any possible construction to apply to any portion of the period between January 1 and April 1, 1918, and were specifically not to apply to the period from March 21 to April 1, 1918. These dates show that Section 3 cannot have the application given to it by the Director General or by the Court below. The significance of these dates will be further argued when the contract is more fully considered.

Under the most drastic construction of Section 3 made by the Director General the plaintiff is entitled to judgment on the several items set out in the petition for the period from January 1 to April 1, 1918.

V.

**The Real Purposes of the Contract.**

It is to be remembered that the railroads of the United States, including the plaintiff below, were taken under Federal control finally on January 1, 1918, for the purpose of aiding in the prosecution of the war then being waged. Of course, as they were taken for public use, the Fifth Amendment to the Constitution and all the laws then on the statute book and those which were subsequently passed in aid of this purpose, should all be applied. It is admitted in the pleadings that this railroad was taken under Federal control and that a notice of relinquishment from such control was issued by the Director General on June 25, 1918. This relinquishment notice the Director General has attempted to abrogate by Section 11 of the contract, and the notice of relinquishment in itself may have been entirely void because it was in violation of Section 1 of the Federal Control Act. But these matters may be entirely disregarded because the railroad company did upon receipt of the notice of relinquishment resume control and operation of its own railroad, and the further provisions of the Transportation Act of March 21, 1920, were applied so far as the same were applicable.

The Director General in his report to the 67th Congress, 4th Session, in House Document No. 546, on page 5, in regard to short-line railroads, says:

> "There are some 855 short-line railroads in the United States. The Railroad Administration did not take over the actual operation of these properties, and prior to June 30, 1918, they were formally relinquished from any question of constructive Federal control."

The question of actual control of these 855 short line railroads is no longer a matter of doubt, as the question has been settled by numerous decisions of the Interstate Commerce Commission and by a long line of settlements made to the different railroads in accordance with those decisions. The sole question, therefore, now to be considered is as to the liability of the Director General for the losses and damages and compensation set out in the petition of the plaintiff as affected by the different provisions of the contract, if the contract or any of its provisions can be applied to the claim set out in the petition.

In order to determine this question the whole contract must be taken into consideration. Sections 1, 2, and 11, of the contract indicate very plainly the doubt and uncertainty of the Director General when he drafted the contract as alleged in the petition and admitted by the demurrer. When the provisions of the different sections are all taken together, it is seen that the contract taken as a whole and construed by each of its different parts are drafted for the purpose of assuring the railroads of their rates, fares, and divisions, their equitable allotment of cars with two days free time for loading and unloading, and for the rights or privileges of the plaintiff to purchase supplies and repairs under the most favorable circumstances possible. These provisions did not give the railroad anything that it did not

then possess, but the contract was an assurance of the continued existence of those conditions during the time limits set out in the contract.

Section 3 of the contract then provided that for any of such assurances or privileges the plaintiff could not recover any losses or claims arising in law or equity against the Director General under the Federal Control Act.

The very statement of these provisions shows that no general language in Section 3 can be construed as a receipt in full or as a general waiver because the contract itself provides that Section 3 shall be in force only from and after April 1, 1918; that it shall not apply to any rights or claims prior to April 1, 1918, and specifically was "not intended to affect any claim said company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act."

Section 3 then begins only on April 1, and was not intended by its very terms to apply to the period between March 21 and April 1. The language of Section 3 then is so limited by Section 11 that it cannot apply to the cash payment specially provided for, and cannot apply to the 11 days between March 21 and April 1, 1918.

The whole amount of "full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity" mentioned in Section 3, must be the exact claims and rights which are mentioned in the later provisions of the contract, and to those only, and as the limitations of the contract as above set out are specifically mentioned this language of Section 3 cannot be applied to the

items of loss and damage and compensation sued on in the plaintiff's petition.

If Section 3 had been intended as a receipt in full for the losses and damages and compensation for the period between January 1 and June 25, 1918, then the receipt could not have been made to take effect and be enforced only after April 1, and could not have been prevented from applying after January 1, and to the 11 days between March 21, and April 1, 1918, and other items in Section 11 could not have been expressly exempted therefrom. This view of the whole contract is shown in the following testimony by the Government officials.

This view of section 3 is also borne out specifically and fully by the conduct of the Director General, and by his own words as publicly announced and made a matter of public record in the annual report of Mr. W. G. McAdoo in 1918, marked "Law" and "Confidential," under date of January 27, 1919, where at page 14 it is said:

> "At the time of relinquishment it was announced that a policy of co-operation with relinquished roads would be maintained, assuring fair divisions of joint rates, adequate car supply, and the preservation of routings so far as consistent with the national needs.
>
> "This policy finally, after hearings afforded the interested lines, ripened into a co-operative contract, which was announced on October 30, copy of which is appended. By its terms the order of relinquishment is recalled, the road is operated by its own officers, retaining its operating receipts, and paying its operating expenses, an equitable car allotment with a liberal per diem allowance is assured, the benefit of increased rates is extended to the contract-

ing road, the preservation of routing of competitive traffic is guaranteed in the same ratio as such traffic bore to the total traffic in the three years ending December 31, 1917, fair tariff publicity is given, and the advantage of unified purchasing under Federal control extended."

In testimony of Mr. Hines, the Director General, given on February 10, 1919, before the contract in issue was made, and printed in the public document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-fifth Congress, Third Session, it is said, beginning on pages 155 and 159:

"Mr. Hines: With respect to the short-line railroads which the President relinquished, and which therefore the Railroad Administration is not operating, we have not undertaken to control their conditions and betterments, and therefore have made no plans for furnishing money on that account or furnishing any other money for improvement purposes on those short lines, or for any other purposes except to the extent that we make certain operating readjustments with them which are not necessary to be taken into consideration for present purposes.

"The Chairman: But perhaps for the record it may be well to understand just what, if anything, has been done in the way of relationship with them in connection with operation to relieve the situation which they claimed would exist, and would be detrimental to them as a result of the Government taking control of the class 1 roads.

"Mr. Hines: We have made an arrangement whereby we will make co-operative contracts with the short-line railroads which were relinquished. Under those contracts we relieve them of the per diem on

freight cars which but for this arrangement they would owe the Railroad Administration for the use of such cars, and this release is to go back to March 21, the date of the Federal control act. We have also arranged to protect them for the future in the amount of competitive traffic, where there was competive traffic, equal to that which they enjoyed on an average during the test period; that is during the three years ending June 30, 1917, and we have also arranged to make with them a readjustment through a cash payment for competitive traffic which they may claim to have lost and the loss of which they may establish to our satisfaction from March 21, 1918, the date of the Federal control act, down to the date of the contract. These are what I spoke of as cash payments in connection with operating readjustments. I think the concessions thus made will reasonably protect these short lines against the difficulties which they have pointed out as being incident to their situation of not being included under Federal operation. * * *

"The Chairman: Is it more to the interest of the Government, leaving aside the interest the Government may have in preserving the credit and standing of these railroads generally, to make this arrangement, than to do the economic thing which your statement a few moments ago implied, of carrying traffic without regard to the fortunes of particular roads that were considered only by the class 1 roads, in order to prevent some other class 1 roads from getting competitive business?

"Mr. Hines: If we had not interest in the matter beyond the mere operation of the railroads actually under Federal operation, the natural thing to do would be not to make this allowance; but we are charged, as we look at it, with a measure of responsi-

> bility for the general situation, and we do not feel we could properly adopt a course which would result in so injuring these short-line railroads as to disable them to perform the public service for which local communities are dependent upon them. We feel, under the discretion vested in the President, that the roads could have been retained in complete Federal operation, and thereby the Government, in order to keep them adequately serving the public, would have assumed a very heavy responsibility for rentals. We feel the course we have adopted involves a much less burden on the Government and accomplishes the same public interest, and that therefore the power we have exercised is a lesser power included in the greater power that the act conferred."

In the testimony of Mr. Hines given on June 3, 1919, and found in the document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-sixth Congress, First Session, beginning on page 129, it is further said:

> "Mr. Hines: We have not paid them. You see the situation with the short-line companies is that we do not agree to pay them anything as compensation for the use of their property. There are two respects in which our agreements may involve the payment of money to them; one is, that we give them two days' free time on the use of cars; that is, to certain classes of short-line roads, and that will involve a money payment, and will depend on how many cars they take and how long they keep them. Another is that we agreed during Federal control to give them substantially the same amount of interchange traffic which they enjoyed during the test period, and it is contemplated that we will make some money settlement for that part of the past

period of Federal control, in the event the interchange traffic they enjoyed in that time fell short of what they would be entitled to under the contract, but that is a thing that would have to be worked out as to each company, and we have felt that we were not in position to make any estimate that would really be useful. It would be after all a surmise, and since the amounts involved would not be so large as to disturb the general character of the appropriation, it would be better to wait until we knew the exact facts.

"Mr. Slemp: Are the short-line roads making any serious claims for themselves in regard to compensation?

"Mr. Hines: Mr. Slemp, I will be glad to verify that. My present impression is that those claims have not taken definite shape.

"Mr. Slemp: No real difference has developed up to date between them and the Railroad Administration?

"Mr. Hines: Not that I am aware of, but I will verify that and advise you later."

In the testimony of Mr. Sherley, the Director of Finance, found in the public document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-sixth Congress, Second Session, on page 152, it is said:

"The Chairman: In arriving at the balance due on compensation have you taken into consideration the provisions of the transportation act with regard to the short lines?

"Mr. Sherley: No, sir; because the indebtedness of the short lines is not an indebtedness that we are not liable to pay, as the transportation act provides that any indebtedness due to the short lines shall be paid

> by the Secretary of the Treasury, and an indefinite appropriation is made for whatever sum may develop."

This testimony from the Director General of Railroads is not incompetent as varying the terms of a written contract, but goes to show what subjects were before the Director General and the officers of the plaintiff when the contract in question was written. It is always competent to show that the parties to a contract had no reference to a subject-matter which is not included within the contract. The testimony just quoted shows especially and fully that neither Mr. Hines nor Mr. Payne had the subjects sued on in section 5 of the petition before them when the contract was made, and as this is shown, then the subject-matter of such items cannot be included in section 3 of the contract, and that section 3 does not by any possible construction or intention refer even remotely to any of such items. It must be concluded, therefore, upon these points that section 3 of the contract by no possible construction can be made to apply to losses in operating expenses, maintenance of ways and structures, sufficient supplies and equipment, or to general compensation as provided by law.

Section 11 of the contract, found at page 9 of the record, is as follows:

> "In view of the foregoing covenants and agreements, and subject thereto, the order of relinquishment issued on the 29th day of June, 1918, is hereby rescinded and set aside as of the date when the same was issued; and the said railroad and the properties herein described are hereby brought fully within the terms and under the control of said Federal Control

Act, the same in all respects as if the said order of relinquishment had not been issued. This contract shall become effective as of April 1, 1918, with the same effect as if it had been executed and delivered on said date."

The purpose of this section cannot be considered an entire mystery. It was inserted by the Director General for some purpose. It cannot be construed separate and distinct and without a bearing upon any other section of the contract. It says that, "In view of the foregoing covenants and agreements and subject thereto," it provides that the relinquishment of the railroad from Federal Control on the 29th day of June, 1918, is set aside and the railroad is to be considered as having been under Federal Control all the time from its beginning on January 1st, 1918, to its end on March 31st, 1920. This section further provides that the contract itself instead of being made on the 26th day of February, 1919, was to be considered as having been made and put in effect on April 1st, 1918. All of these provisions having been written by the Director General must have some meaning and must somehow be given a rational construction if that be possible.

Now, what construction can be given to this Section 11 in connection with the other sections, and especially with Section 3?

If this Section 11 be given any force whatever, then it must mean that there was no relinquishment effected, that the railroad was under Federal Control the whole time in which Federal Control continued and that Section 3 cannot be considered as any receipt in full as claimed by the defense. There is no possible way for Section 3 to be considered as a

receipt in full for the unexpired period lasting from April 1st, 1918, to March 31st, 1920, and for losses unconsidered and without any possible estimate whatever.

If Section 11 is given any force whatever, then this contract provides for two years of Federal Control without estimating the losses or the damages to be paid under the Control Act by the Director General for that period of 2 years. Again, if Section 11 is given any force, then the railroad was under Federal Control for the first 3 months of the Federal Control period and Section 3 cannot then be considered as a settlement and a receipt in full for either the first 3 months before April 1st, 1918, or for the 2 years succeeding thereto.

Section 11 is just as binding as any other section of the contract, and it cannot be harmonized to any extent whatever with the view of Section 3 expressed by the defense in this case.

Section 3 cannot stand as a receipt in full or for any such purpose as is expressed in the defense, in view of Section 11, and yet Section 11 was drawn at the same time and in the same instrument as Section 3.

The simple fact remains that in view of Section 11, Section 3 is shown by the intrument itelf to be without any consideration whatever, and for no purpose can be considered as a settlement of the claim involved, and in view of Section 11, Section 3 furnishes no ground of defense.

The second paragraph of Section 13 reads as follows:

> "In the event the Company shall show that it has suffered from the diversion of competitive freight traffic between March 21, 1918, and April 1, 1918, it shall be reimbursed as provided herein."

When this paragraph is applied to Section 3 of the contract, it is shown that Section 3 was not intended by the Director General to contain a receipt in full as is now claimed in the defense. This paragraph specifically states that if the company shall suffer any loss between March 21 and April 1, 1918, "it shall be reimbursed as provided herein."

This shows on its face that Section 3 was not considered at the time the contract was drawn as a receipt in full as now claimed. This paragraph cannot be overlooked, it cannot be ignored, it does not make a new promise, but it does carry the meaning that there might be an unsettled account in favor of the plaintiff for the 11 days between the two dates above mentioned. When this is taken into consideration, then it is perfectly plain that Section 3 does not carry such a receipt as is claimed by the defense.

## VI.

### Trunk Line Contracts.

This view of the contract set out as an exhibit to the petition below is fully sustained by a consideration of the trunk line contracts made under the same law by the Director General at the same time and for the same purposes, which trunk line contract is set out fully beginning at page 39 of the Public Acts and Proclamations of the President relating to the United States Railroad Administration under date of December 31, 1918, where Section 5 is inserted providing for "upkeep" and where Section 7 is inserted providing for "compensation." Here it is specifically provided that for the trunk lines these items were within the contracts and due terms of settlement were used. This is fully shown in Sec-

tion 3 of the trunk line contracts, which particularly corresponds to Section 3 of the short line contracts, but it is significant that while Section 3 of the short line contract contains no reference to compensation or claims for losses and damages, as set out in the petition, yet under Section 3 of the trunk line contract in order to provide for the settlement of "upkeep" and "compensation," one significant clause is inserted in the terms of the acceptance, which clause reads as follows:

> "* * * for compensation under the Constitution and laws of the United States for the taking possession of its property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to its business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

Here in the trunk line contract the Director General and trunk line railroads considered "upkeep" and "compensation," and in the receipt provided it is shown that when fully settled the receipt should include these items.

If the Director General under the trunk line contracts was to provide for the payment of "upkeep" and "compensation," and agreed to do so, then on what ground the defendants can now say that the short line railroads, and especially the appellant, could be taken for public use and no losses or damages or compensation be paid for such use, and how can the demurrer be sustained as to the petition of the plaintiff?

The Constitution does not say that if the trunk lines shall be taken for the public use just compensation should be

made, but that if short line railroads are taken for the same use no compensation need be made. No such distinction has been made by Congress and no such distinction has been authorized by law.

VII.

**The Consideration in the Contract.**

It is not alleged nor now claimed that the contract was wholly and absolutely void because of total lack of consideration, or because the same was executed under forceable and legal duress. That great stress of conditions was in existence when the contract was drawn is not denied and is alleged in the petition, but the sole consideration running to the plaintiff was according to the allegations of the petition and in truth and in fact solely a continuation of the conditions then existing by law. The sole consideration, therefore, to which Section 3 can be applied was that no claim could be sustained in favor of the plaintiff for a violation of these provisions set out in Sections 5, 6, and 8 of the contract. The Director General gave nothing according to the allegations of the petition. He took everything for the period mentioned which the railroad possessed. The railroad agreed because of the continuance of the statutory rights in Sections 5, 6, and 8, that no claim would be allowed under these sections, but there is no more pretense for saying that Section 3 should prohibit the railroad from recovering for the losses and damages and compensation set out in the petition than for saying that a trunk line should be deprived of recovery for its corresponding losses, damages and compensation.

Section 9 of the contract provides that there shall be no discrimination against the company in regard to certain mat-

ters therein set out, but the Director General now proposes to exercise a harsh discrimination against this company and the other 117 short line railroads which signed similar contracts as against the rest of the 855 short line railroads and hundreds of trunk line railroads, all of which have been paid or are in process of being paid for their losses, damages and compensation. Why the Director General should exercise such discrimination against 218 railroads which signed a contract similar to the one in issue, is beyond explanation. No difference existed between the service rendered by the short line railroads which signed the contract and those which refused to sign the contract. Some 218 railroads are to be punished and the rest of the 855 short line railroads may go free and recover their claims by the law. There is no consideration moving toward the Director General which would deprive the plaintiff from its rights under the petition. It alleged that

> "no other or further consideration of any kind or nature whatsoever was intended in said contract so drawn and required by the Director General, and no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto. The plaintiff gained nothing by the execution of the contract and by it no rights were lost."

## VIII.

### An Unfounded Position.

The claim of the defendants that no recovery can be had because of Section 3 of the contract is entirely unfounded. There is no language of the contract which would authorize

such a construction. Any such general language if taken separate and distinct from everything else would be open to construction by competent evidence, which evidence the Court denied the plaintiff when it was offered according to law. The other sections of the contract contain so many provisions and limitations wholly denying a general application of Section 3 to the claims set out in the petition, that Section 3 cannot be given the construction demanded by the defendants except in open defiance to all rules of law and to the other provisions of the contract themselves.

Section 3 then has no application to any time before April 1, 1918. It has no application to the 11 days between March 21 and April 1, 1918. It has no application to the cash payment provided for in Section 13. It has no application by its own terms to anything not based upon the Federal Control Act which took effect March 21, 1918.

Section 3, therefore, is so limited, is so constructed as a part of the whole contract, that to apply it as a receipt in full or as a general waiver of the claims for losses, damages and compensation set out in the petition, is not only unfounded, but is absurd. The position, therefore, that the language of Section 3 drawn as it was and for the purposes stated, drawn as a part of thirteen sections, and drawn in view of the language set out in Sections 1 and 2 and as a part of a contract executed on February 26, 1919, and attempted to be made retroactive beginning April 1, 1918, which was a legal impossibility, is not only unfounded and absurd, but is nothing less than untrustworthy. It is as illegal as it is unconscionable. We are not suing for an equitable right, but we are suing for a right guaranteed by the Constitution and based upon the Federal Control Act which was in itself not only

legal, but most equitable. How the defendants could settle similar claims of the trunk lines and of the rest of the short lines and then deny a similar settlement to about one-fourth of the total number of short lines who signed similar contracts, is a question which must be decided by the defendants themselves. Some reason must be given for this discrimination. The Court below rendered no reason and the defendants have indicated no reason excepting such as is conveyed by a misapplied construction of the language of Section 3. When this language is construed in the light of the contract itself, the position is rendered untenable.

## IX.

### Section 3 No Legal Waiver.

When Section 3 of the contract is fairly considered it will be found that there is no legal waiver contained in its provisions applying to the four items set out in the claim of the plaintiff.

The requisites of a legal waiver are easily ascertained.

A waiver is defined by the Supreme Court of the United States in the case of *Bennecke vs. Connecticut Mutual Life Insurance Co.*, 105 U. S., 355; 26 L., 990, as follows:

> "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule not only where there is a direct and precise agreement to waive the stipulation, but also where it is sought to deduce a waiver from the conduct of the party."

This definition has been approved so many times that it would be useless even to cite the cases where such approval has been made. A waiver is generally defined as "an intentional relinquishment of a known right." 28 Am. & Eng. Enc. of Law, 527; 40 Cyc., 252.

The allegations of the petition deny that there was any intention on the part of the plaintiff to waive any of its known rights, and allege that no waiver of such rights was ever made, and these allegations again are admitted by the demurrer and are in nowise in conflict with the language of the contract. Under this rule of law and under the allegations of the petition there is no ground for the claim that any waiver of any right to the recovery of any loss or compensation for the first six months of the Federal control period was ever made, and for this reason the demurrer should be overruled.

## X.

**The Contract of February 26, 1919 is Void on its Face.**

The contract set out as Exhibit A of the petition cannot bar the plaintiff's right to recover for the items in suit, since it is absolutely null and void on its face. The said contract shows upon its face that the plaintiff was released from Federal Control on June 29, 1918. The contract further shows upon its face that it was executed on February 26, 1919, 8 months after the said relinquishment. The contract therefore shows that the Director General, getting all of his power from the Federal Control Act, had exercised all of that power in regard to that railroad and had released the same, which relinquishment had been accepted and

acted upon by the plaintiff railroad company on or by July 1, 1918. Therefore the Director General had no authority whatever to make any kind of a contract of the nature of the one in suit, nor could he secure such power or authority by an attempt to retake the railroad under Federal Control after the release therefrom had been issued by the Director General and accepted and acted upon by the plaintiff. The only thing that the Director General had legal power to do after the said date of relinquishment was to settle any claims that may have arisen under the law during the period of control, and as he has refused to settle he had no authority to act or even contract. The Director General today has as much power towards any or all roads taken under Federal Control as he had over the plaintiff road when this contract was executed.

XI.

**Construction of War Statutes.**

The Act of Congress authorizing the President to take control and possession of the railroads was a war measure which was followed by the Federal Control Act applying retroactively to settlement of all claims on behalf of the railroads beginning on January 1, 1918. This Court has recently had occasion to construe such statutes passed for the same general purposes and in the case of *Houston Coal Co. vs. The United States*, 262 U. S. 361, Mr. Justice McReynolds says:

> "The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers

over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States v. Pfitsch*, 256 U. S., 547, by deliberate purpose the different sections of the Act provide varying remedies for owners—some in the district courts and some in the Court of Claims.

"It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think, Section 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section."

It has been heretofore fully discussed that Section 3 does not cover or apply to any of the items set out in the petition of the plaintiffs. It has also been shown that no payment has been made for the loss described in those items and no compensation was given to the plaintiff for the first six months of the Federal Control period. The limited consideration in the contract applied only to the sections of the contract specifically set out, and the petition specifically denies that any consideration whatsoever was given or intended to be given covering the waiver set out in Section 3, or authorized such waiver to be extended to the items set out in the petition of the plaintiff. This contract, while not wholly void for lack of consideration as to the conditions set out in Sections 5, 6 and 8 of the contract, yet the con-

tract is absolutely void when attempted to be applied to the items of loss and compensation set out in the petition. No consideration was paid by the Director General for the items so set out, and none was ever received by the plaintiff, and no such construction was ever intended to be applied by the Director General or by the plaintiff.

Under the law, then, as quoted above, and under the facts admitted to be true, Section 3 of the contract does not cover the items in suit, nor does it prevent the plaintiff from recovering thereon.

For these reasons the judgment of the Court of Claims in sustaining the demurrer and dismissing the petition should be reversed.

Respectfully submitted,

S. S. ASHBAUGH,
*Attorney for Appellant.*

G. B. WEBSTER,
*Of Counsel.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

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## No. 229

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THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

*vs.*

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

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## PETITION FOR REHEARING.

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E. B. ASHBAUGH,
*Attorney for Appellant.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1924.**

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# No. 229

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THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

*vs.*

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

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## PETITION FOR REHEARING.

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Comes now the appellant above named and respectfully presents this petition for a rehearing of this case, and further asks that the same may be set down for another argument at the same time as the argument to be presented to this Court in the case of the Marion and Rye Valley Railroad Company against the United States, number 991 of the present docket, as these cases grow out of the same transactions had with short-line railroads under the Federal Control Act, and that it may be set for hearing at an early convenience of the Court.

## Basis of Petition.

This petition refers not only to the difficulties of the short-line railroad companies, but equally to the difficulties before the Director General, the Interstate Commerce Commission, and the Treasury Department in settling the claims as directed by Congress in the Federal Control Act and the Transportation Act of 1920. These acts of Congress are directly involved and are of more lasting administrative value than the millions of money in question. The first sections of the Transportation Act of 1920, as well as the first sections of the Federal Control Act of 1918, must be construed together. These sections are parts of the same subject, but they have been seriously misconstrued.

The appellant does not allege that the reconsideration of the appellant's original argument is the sole reason for this petition; but it relies upon the statements in the appellant's brief and oral argument before this Court as one reason why a rehearing should be had, but in addition the appellant alleges that the consequences following the decisions of the Court in these short-line cases are of such a nature and of such an unexpected extent that a re-examination of the issues should be had before the Court. These consequences indicate something wrong. Departmental construction is overturned. The several departments construed these laws immediately after their enactment by Congress, and are still construing them daily in the settlement of the claims of these railroads growing out of Federal control for not only the first six months, but for the last 20 months of the Federal Control period. Many millions of dollars have been paid out

upon this departmental construction given by the Interstate Commerce Commission and the Treasury Department, which departmental construction is in direct conflict with the decision of this Court holding that the contracts set out in the petitions are receipts in full for all claims against the United States based upon the Federal Control Act. If this decision is a correct construction of the contract in issue, then the Interstate Commerce Commission, under the Transportation Act of 1920, has paid out many millions of dollars in settlement of these claims arising during the last 20 months of the Federal Control period when that Commission had before it about 120 similar co-operative contracts which are now held to be receipts in full for all claims during the whole period of Federal control.

It is apparent that if these contracts were receipts in full for all claims arising in favor of the railroad and against the Government during the period of Federal control, then the payment of these claims arising during the last 20 months of that period must inevitably have been made in direct violation of law and in disregard of such receipt, and under such circumstances the railroads receiving such payments would be compelled to return the amounts so received, even to the destructon of their corporate existence.

Again, if these contracts were receipts in full for all such claims, then the Treasury Department, in issuing its warrant to such a railroad having an outstanding receipt in full for the items mentioned, would be paying a claim which had already been liquidated, and such payment would be in direct violation of law and return of the amount should be had.

These far-reaching effects make a basis for this petition which we respectfully suggest will warrant this Court in re-

hearing these cases and applying the provisions of the Federal Control Act and of the Transportation Act of 1920 more particularly to the construction of the contracts in issue.

## Original Argument.

Counsel for the appellant in the preparation of the brief and in the oral argument before the Court had assumed the allegations in the petition which were to be taken as true were sufficient in themselves to point to a different construction of the contract than the one given by the Court. It was there assumed and argued that the allegations, the contract itself, and the admissions in open Court all showed that the contract was without any consideration whatever, that it was not understood by the parties signing the same to have been executed as a receipt in full for the claims sued on, and it was further assumed that these facts and the law cited indicated that the contracts were to be construed in the light of the other sections of the contract. No departmental construction was therefore presented to the Court, although the departmental construction was instituted immediately after the law went into effect, and it included the well-known process of settlement by the Interstate Commerce Commission, which construction by the Commission forbids the theory that they were paying claims which had been settled by the railroads in the execution of the contract.

To the original argument, therefore, which we here reaffirm, we now wish to add extended departmental constructions which have been followed and which are now being followed in the payment of many millions of dollars for the claims arising during the last 20 months of the period of

Federal control, and which payments cannot be justified in the past or in the future with outstanding receipts in full.

**Departmental Construction.**

It is unnecessary to cite to this Court the binding effect of departmental construction in such matters as are now presented in this case. The Federal Control Act and the Transportation Act of 1920 were both passed for the purpose of taking care of an extreme situation created by the war with Germany. It was deemed by Congress necessary for the Government to take possession, control, and operation of the railroads, and it did not specify exactly what railroads should be so taken. The Director General of Railroads made objection to the taking of the short-line railroads under control because he thought he did not need them in the general transportation required by the war. Congress early saw the difficulties which would immediately arise if certain railroads were taken and others left, and for this reason, before the Act of March 21, 1918, was passed, Congress inserted in Section 1 of the Federal Control Act the following provision:

> "That every railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken possession, use and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within Federal control as herein defined and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act,"

which provision is not only in the law, but is set out in full in the contract attached to the petition in this case and marked Exhibit A and found beginning on page 6 of the transcript. This insertion in the Federal Control Act, made by Congress just before the Act was passed and directly in refutation of the claim of the Director General and which is expressly referred to in Section 1 of the Transportation Act where it says,

"or under the Federal Control Act,"

shows that the roads now before this Court were taken under Federal Control by direct Act of Congress, anything stated by the Director General in the briefs or arguments in these cases to the contrary notwithstanding. After this insertion in the Federal Control Act and its subsequent approval, the question of the appellant roads being under Federal control from January 1 to July 1, 1918, is not open to further question. This section of the law becomes very important in view of the case now on the docket of this Court, number 991, entitled the *Marion & Rye Valley Railroad Co. vs. The United States.*

The first sections of the Federal Control Act and Sections 202, 203, and 204 of the Transportation Act established forever the question of the liability of the Government to the several railroad companies for the taking of their property for the prosecution of the war. There was no free gift mentioned, but the first sections of the Federal Control Act and of the Transportation Act did provide that these obligations of the Government should be settled according to the provisions of these two statutes. The mode of procedure in both cases was provided. The Government and the railroad should

agree upon the amount to be paid, and in the absence of an agreement, referees should be appointed by the Interstate Commerce Commission and the amounts so found due should be paid, and if not paid, an appeal should be had to the Court of Claims for a judgment which under the law the Treasury Department would liquidate.

It was found difficult under the Federal Control Act to ascertain by expert witnesses the exact amount due in settlement of these claims, and so Congress on February 28, 1920, created the arbitrary measure by which the losses could be easily ascertained, and in a supplemental measure directed the Interstate Commerce Commission, in Sections 204 and 209 of the Transportation Act, to apply this new measure and to settle claims for that part of the Control period during which the short-line railroads operated their own roads. These sections specifically took into account the fact that the Director General had relinquished the great majority of the short-line roads from Federal control, which relinquishment applies to the cases now before the Court. The Interstate Commerce Commission, in pursuance of this Act, immediately began its computation of losses and immediately began the payment of the amounts so ascertained to be due, and the Treasury Department immediately began the actual payments of the amounts. These amounts are many millions of dollars, the exact amount of which payment is immaterial, but these payments are still being made by the Interstate Commerce Commission and the Treasury Department.

If these contracts in suit are payments in full, as construed by the Court, then the Interstate Commerce Commission cannot carry out these provisions of the Transportation Act in any case where a contract had been entered into as in

the case at bar. This contemporary construction by the Interstate Commerce Commission and by the Treasury Department is a convincing construction which is in conflict with the construction given by the Court in this case, because payment cannot be made upon a claim with a receipt in full for that claim on the desk of the payer.

It is perfectly apparent that the contracts in suit do not apply only to the first six months of the period of Federal control. The language of the contract states that it applies to all claims growing out of Federal control, and does not pretend to apply to the first six months only. There is no way that this contract could be applied solely to the first six months of the period of Federal control, and so its provisions apply as well to the last 20 months under the jurisdiction of the Interstate Commerce Commission given by the Transportation Act.

These separate jurisdictions of the Director General and of the Interstate Commerce Commission to settle all these claims for the whole period of 26 months are all provided for in Sections 2, 200, 202, 203, 204, 205, 207, 208, and 209 of the Transportation Act of 1920, and the fact that these jurisdictions do not overlap or interfere with each other does not prevent each Department from being bound by a receipt in full for the whole period.

**Return of the Money.**

It is apparent that under the present construction of these contracts the payments by the Interstate Commerce Commission to the contract short-line railroads must have been in direct violation of law, and under the general statutes in

such cases made and provided these amounts must be recovered and returned to the Treasury. If such demands should be made upon these short-line railroads in these contract cases, and if the money has to be returned, the road would become insolvent, receivership would follow, the Government would be compelled to take what it could get, bankruptcy would follow in hundreds of cases and would bring an appalling condition at the very time that the Interstate Commerce Commission is exerting itself to carry out the law in bringing about the consolidation of the railroads into a more feasible system of transportation. This very return of the money so paid out would inevitably interfere with the general transportation of the country and the consolidation of railroads now under consideration. This very condition shows that the construction given to these contracts is wrong, and is such an error that the attention of the Court should be called to it. The loss of a few thousand dollars to different short-line railroads for the claims arising during the first six months of Federal control is only a small and insignificant part of the damage wrought by construing these contracts as receipts in full. The first six months of Federal control was about one-quarter of the total period, and perhaps the claims arising during that six months' period would be proportionately one-quarter of the total claims arising during the whole period. If three-fourths of all these claims have been settled and paid, or are in process of settlement and payment, the amount is so great as to warrant the Court in granting a rehearing of these cases and giving all parties an opportunity to present their arguments on the final hearing.

**The Marion and Rye Valley Case.**

The case of the *Marion and Rye Valley Railroad Company vs. The United States* was decided by the Court of Claims in favor of the defendants, holding that the railroad was never taken under Federal control, and that no obligation on the part of the Government was created in favor of the railroad company, although the Board of Referees found the loss to be something like $15,000. This case presents only one phase of the construction of the Federal Control Act. If the Marion and Rye Valley Railroad was not taken under Federal control, and if no short-line railroad was taken under Federal control, then no obligation arose on the part of the Government in favor of any short-line railroad and all the work of the Director General and the Interstate Commerce Commission in the settlement of any claims in favor of the short-line railroads was illegal, and any money so paid out should be returned to the Treasury. The question as to whether the Marion and Rye Valley Railroad therefore was taken under Federal control becomes not only an important one, but the decision of the Court of Claims in this case brings a condition absolutely appalling. Congress could, then, have meant nothing by the insertion of the paragraph in Section 1 of the Federal Control Act, and the Interstate Commerce Commission has no jurisdiction whatever under the Transportation Act to pay out one dollar to a short-line railroad which was not taken under Federal control. If all of the work of the Interstate Commerce Commission and the Treasury Department is to be declared illegal and void because the short-line railroads were not taken under Federal

control as directed by Congress, then the decision of this Court in the Marion and Rye Valley case, number 991 of the present docket, will be of overwhelming importance, and the case should be advanced and heard at the earliest convenience of the Court, and, as suggested above, the construction of the short-line contracts should be embodied in a general reconsideration, so that these claims might be speedily settled and the Interstate Commerce Commission and the Treasury Department be relieved of the uncertainty, the doubt, and the possibility of illegality of their acts under which extensive proceedings have been had.

Because of these conditions, all of which grow out directly from the decision of the two cases already made and the possible decision of the Court in the case now on the docket and undisposed of, a rehearing is respectfully requested and these cases set in connection with the Marion and Rye Valley case at such a time as would be at the convenience of the Court.

Respectfully submitted,

S. S. ASHBAUGH,
*Attorney for Appellant.*

# In the Supreme Court of the United States

OCTOBER TERM, 1924

THE ST. LOUIS, KENNETT & SOUTHEASTERN Railroad Company

*v.*

THE UNITED STATES AND JAMES C. DAVIS, Director General of Railroads

No. 229

*APPEAL FROM THE COURT OF CLAIMS*

## BRIEF ON BEHALF OF APPELLEES

### STATEMENT OF THE CASE

This proceeding is an appeal from an order of the Court of Claims sustaining appellee's demurrer to appellant's amended petition filed in said court and dismissing the same.

In his amended petition appellant alleged that under the power granted by the act of Congress approved August 29, 1916 (39 Stat. 619, 645), the President of the United States on December 26, 1917, issued his Proclamation and thereby took possession and control of appellant's railroad and immediately appointed a Director General of Rail-

roads, who took possession and control of appellant's railroad and operated the same down to and including the 29th day of June, 1918; that the issuing of said Proclamation, the taking possession and control of appellant's railroad, and the operation thereof by the Director General of Railroads were approved by the act of Congress of March 21, 1918, known as the Federal Control Act (40 Stat. 451); that on the 29th day of June, 1918, the Director General relinquished possession and control of appellant's railroad, and from and after said date appellant resumed possession, control, and operation thereof; that the appellees thereby became liable to pay to appellant just compensation for the use, control, and operation of its railroad from January 1, 1918, to July 1, 1918; that said Director General of Railroads has and still refuses to pay appellant any compensation for said use, operation, and control of its said railroad; that the said Director General forced and compelled appellant to accept and sign a certain contract under date of February 26, 1919, a full, true, and correct copy of which was attached to and made a part of appellant's amended petition (Record, page 6); that said contract is null and void for the reason that the same was prepared and executed by the Director General without any power and authority so to do; that no consideration was created therein or intended to be created therein for the use and benefit of appellant; that during said period of six months from January 1 to July

1, 1918, because of the said control and operation of appellant's railroad it sustained a loss in its operating income and a further loss in the under-maintenance of its equipment and of its ways and structures and also on account of the Director General having failed and refused to furnish the necessary supplies and materials used in the operation of said railroad during the aforesaid period from January 1, 1918, to July 1, 1918; that after the Director General had refused to pay said claims or any part thereof appellant applied to the Interstate Commerce Commission for the appointment of a board of referees as provided by law, which application was granted and a board of referees was duly appointed, before whom the appellant duly presented its claim as above set forth; that said board of referees duly heard said claim and on June 14, 1922, decided the same and rejected the demands of the appellant, whereupon it filed its said amended petition in said Court of Claims.

To said amended petition appellees filed a demurrer upon the following grounds, to wit.

(1) Facts alleged in the petition do not constitute a cause of action within the jurisdiction of this Court.

(2) Facts alleged in the petition show a complete settlement and satisfaction of any and all claims plaintiff had or could have had against the United States or the Director General of Railroads under the Federal Control Act or on account of anything done or omitted to be done by the United

States of America or the Director General of Railroads in respect to the matters set forth in plaintiff's petition.

After argument and submission of said demurrer the said Court of Claims entered the following order:

> This case was submitted upon defendant's demurrer to plaintiff's amended petition on consideration whereof the Court is of the the opinion that the demurrer is well taken.
>
> It is therefore ordered, adjudged, and decreed that the defendant's said demurrer to the plaintiff's amended petition be sustained, and that the amended petition be and the same is hereby dismissed. (Record, Page 11.)

On November 19, 1923, appellant applied for appeal to this Court, which was allowed by the Court of Claims, and on December 3, 1923, the transcript of record was duly filed with the Clerk of this Court.

## BRIEF AND ARGUMENT

*The action of the Court of Claims in sustaining appellees' demurrer and dismissing appellant's case on the ground that the agreement of February 26, 1919, attached to and made part of his amended petition was a complete and full release and satisfaction of his claims sued on was fully warranted.*

This case turns on the release executed by appellant on February 26, 1919. Said agreement which was attached to and made part of appellant's

amended petition is set out in full in transcript (pp. 6–10). Section 3 of said agreement (Rec. p. 7) contains the release which appellees contend is in full settlement and discharge of appellant's claim now sued on. To rightly understand the scope of said release, we must consider the nature of the claim. The basis of said claim rests on the charge that on December 28, 1917, the President, by virtue of his Proclamation of December 26, 1917, took possession, control, and operation of appellant's railroad and retained said possession and control until July 1, 1918, thereby causing appellant certain losses for which it contends it is entitled to just compensation under the Constitution. It contends that its road was taken under Federal control by said Proclamation, but admits such possession and control were relinquished on June 30, 1918, and that from and after that date appellant resumed possession and operation of its property. Said agreement was executed February 26, 1919, eight months after appellant was in full possession and control of its property.

When the words are free from doubt they must be taken as the final expression of the parties. The language of the agreement controls and not what was said before Committees of Congress, *Mackenzie* vs. *Hare,* 239 U. S. 290. *Caminette* vs. *U. S.,* 242 U. S. 470. History of an act is admissable as an aid to construction only to solve doubt, not to create it. *Wisconsin R. R. Commission* vs. *Chicago & C. R. R.,* 257 U. S. 563. There is no ambi-

guity in the language used in section 3 of said agreement concerning the claims which were thereby settled and satisfied. Appellant's claims were claims arising by virtue of the alleged Federal control; without such control no such claims could have arisen. Said Section is as follows:

SECTION 3

> (a) The company accepts the terms and conditions of said Federal Control Act and terms of this agreement, and expressly accepts the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity, which it now has or hereafter can have, against the United States, the President, the Director General or any Agent or Agency thereof *by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to.*

The acts of Congress referred to in said agreement are—

(a) The joint resolutions of the Senate and House of Representatives bearing the date April 6 and December 7, 1917, and

(b) The act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes. (39 Stat. 619, 645.)

(c) The Federal Control Act approved by the President March 21, 1918. (40 Stat. 451.)

According to the foregoing language in said section 3 of said agreement, if appellant's claim now sued on arose by *virtue* of the President's Proclamation of December 26, 1917, or by *virtue* of any act of omission or commission by the Director General under the Federal Control Act and a right of action for compensation arising therefrom had accrued to appellant prior to February 26, 1919, the date of the execution of said agreement, said release embraced the same. From appellant's amended petition, it must be conceded that the claims now sued on arose by virtue of its railroad having been under Federal control from January 1, 1918, to July 1, 1918, on which latter date its right of action accrued for just compensation arising out of said Federal control.

In *United States* v. *William Cramp & Sons,* 206 U. S. 118, 128, wherein the language used was less comprehensive than in the agreement in the case at bar, this Court in holding the language used in said case covered "all claims" said:

> (a) Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction. The general language "and all manner of debts," et cetera, indicates a purpose to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled, their intent so to do should be made manifest.

The Court in *Kirchner* v. *New Home Sewing Machine Co.* (Court Appeals N. Y.) 31 N. E. 1104, says: "In the early case of *Pierson* v. *Hooker,* 3 Johns 68, the release was of and from all debts and demands of every nature and kind whatsoever" and evidence was offered and excluded at the trial to show that at the time of its execution, it was not intended to include the demand in suit; and Chief Justice Kent held the ruling correct, saying (p. 70). "The instrument is general and comprehensive and expressly reaches to every debt and demand of every kind. To show by parole proof that it was not so intended is to contradict or explain away the instrument, which is contrary to the established rule of law." The Court in the *Kirchener* case further said "it is competent for a person by his own act to forego a recovery for unknown as well as known causes of action. Construing the language of a release, as we must, most strongly against the grantor, if words are used fairly importing a general discharge, the effect can not be limited by the bare proof that the releasor had no knowledge of the existence of the demand in controversy."

*Slayton* v. *Hamkill,* 36 N. Y. Supp. 249, a general release between persons will, so long as it is not set aside, bar action by one against the other for a cause existing at the time of the release, though not known by the plaintiff. (Cites *Kirchener case, supra.*) See also *Clark* v. *Roberts* (Mass.) 62 N. E. 253.

While not obliged to do so, it was the policy of the Government to extend assistance to the short lines that had been relinquished upon certain conditions embodied in a short-line agreement tendered to such short lines generally. In that agreement the Government proposed to make certain concessions or agreements in favor of the short lines. Without attempting to point out all of such concessions and agreements, we call attention to the following:

In section 5 of the agreement the Government proposed to agree with the short lines that divisions of joint rates should be fair and that the divisions in effect January 1, 1918, should not be decreased and that in any increase in joint rates the short line should share in the same percentage as then in effect.

In section 6 of the agreement the Government proposed to agree to allot to the short lines an equitable proportion of its cars (and motive power, if feasible), and to grant a reclaim allowance on lines like that of appellant of two days. This reclaim allowance means two days' free time for the short line for use of all cars furnished the short line by the Director General.

In section 7 of the agreement the Government proposed to agree that the short line may use the Government's purchasing agencies and purchase supplies at the cost to the Government. On account of the Government purchasing in large volume, this agreement would doubtless mean a con-

siderable saving to the short line. The Government also, in such Section, proposed to permit the short line to have its repairs made in the Government's shops, the same as prior to Federal control.

In section 9 of the agreement the Government proposed to agree that in the conduct of its transportation business and in publishing tariffs and rates it would not discriminate against the short line and in favor of its own lines.

In section 13 of the agreement the Government proposed to agree to compensate the short line for any loss it suffered prior to November 1, 1918, on account of diversion of traffic from the short line, and to see to it thereafter that the short line should receive the same proportion of competitive traffic that it had transported during the test period. In consideration of such and other concessions in the agreement proposed the Director General required the short line to agree that if necessity should arise therefor, in the opinion of the Director General, he could resume possession and operation of the railroad, in which event a new contract should be made providing for the "payment of compensation as provided by the Federal Control Act."

These were some of the considerations offered appellant for its release and satisfaction of its claim for compensation for its alleged losses for the first six months of 1918, growing out of the alleged Federal control of its railroad. The appellant acknowledged satisfaction in full of all the claims it then had (February 26, 1919) in consideration of the

benefits for which it bargained. If they have proved less advantageous to the appellant than it anticipated, such fact will not release it from the obligations of its contract. The courts only require a legal consideration and do not inquire into the adequacy thereof, as between parties permitted to contract without the intervention of a guardian.

Appellant suggests a lack of authority in the Director General to make the contract referred to. No reason or authority is suggested in support of such contention. Section 1 of the Federal Control Act expressly gives the Director General, thru the President, absolute authority in the premises. Proclamations of the President appointing the Director General expressly give him all of the power conferred by Congress on the President except that of appointing the Director General.

Section 9 of the Control Act is as follows:

> The President in addition to the powers conferred by this Act shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred.

In this Court appellant abandons the claims set out in its amended petition, viz., that said agreement was executed under duress and that the Director General was without authority to enter into such agreement because on Page 27 of its brief it states:

> It is not alleged nor now claimed that the contract was wholly void because of total

lack of consideration or because the same was executed under forceable and legal duress.

In conclusion, with all due respect to the learned counsel for appellant we are unable to comprehend the argument wherein he contends that this settlement evidenced by section 3 of said agreement did not include compensation, if any, which accrued prior to July 1, 1918. Language could not, we think, be so framed or used as to be of broader import or significance. The agreement says " all claims and rights," both " in law and in equity " which plaintiff " now has or hereafter can have." By what legerdemain can the claims now presented be excluded from " all claims and rights," which the plaintiff " now has " on February 26, 1919, the date of the agreement? What other claims or rights did the appellant have against the Government or against the Director General of Railroads at the time of making the agreement in question? There is no suggestion that the Government was owing the appellant anything on account of any matter occurring or any cause of action accruing after the railroad was relinquished. What, then, was the appellant acknowledging was thus fully satisfied and settled? Under the allegations of the amended petition there could not possibly have been any other claim.

For the reason suggested we respectfully ask that the action of the United States Court of Claims in

sustaining the demurrer and dismissing the petition should be affirmed.

Respectfully submitted.

JAMES M. BECK,
*Solicitor General.*
A. A. MCLAUGHLIN,
SIDNEY F. ANDREWS,
*Attorneys for Appellees.*

## ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 229. Argued January 23, 1925.—Decided March 2, 1925.

1. A railroad company in a contract with the Director General of Railroads expressly accepted the covenants and obligations of the latter and the rights arising thereunder "in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights

[1] See, for example, *Earle* v. *Commonwealth*, 180 Mass. 579; *Allen* v. *Commonwealth*, 188 Mass. 59; Mass. Acts and Resolves, 1895, c. 488, § 14; 1896, c. 450; 1898, c. 551; *Matter of Board of Water Supply*, 211 N. Y. 174.

at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to," viz., the Federal Control Act, the Act of Aug. 29, 1916, c. 418, 39 Stat. 645, and the Joint Resolutions of April 6 and December 7, 1917, 40 Stat. 1, 429. *Held*, that a claim of the railroad under § 3 of the Federal Control Act for a deficit in operating income, etc., previously incurred under federal control, was settled and released by the contract, and that allegations in the company's petition denying this effect and intention were mere conclusions of law, not admitted by demurrer. P. 348.

2. Ordinarily, the defense of release, or accord and satisfaction, must be pleaded in bar; but where the fact appears either in the body of the petition or from an exhibit annexed, the defense may be availed of on demurrer. P. 350.

3. The agreement was within the authority of the Director General. *Id.*

58 Ct. Clms. 339 affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition on demurrer.

*Mr. S. S. Ashbaugh*, with whom *Mr. G. B. Webster* was on the brief, for appellant.

*Mr. Sidney F. Andrews* and *Mr. A. A. McLaughlin*, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims which dismissed the petition on demurrer. The plaintiff owns a short-line railroad which it operated, but which is alleged to have been under federal control from January 1 to July 1, 1918. The suit was brought to recover, for that period, amounts representing the deficit in operating income, under maintenance of way and equipment charges, and the rental value of the property,

which are claimed under § 3 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 454. There was annexed to the petition as an exhibit the copy of a contract between the plaintiff and the Director General of Railroads, dated February 26, 1919. It deals, in the main, with the mutual relations of the parties for the period after July 1, 1918, but section 3 of the contract provides as follows:

"The Company . . . expressly accepts the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to.

"This is not intended to affect any claim said Company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act."

The acts of Congress referred to in the contract were the Federal Control Act, the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, and the Joint Resolutions of April 6, 1917, and December 7, 1917, 40 Stat. 1, 429. The Government assigned as a ground of demurrer that the copy of the contract annexed to the petition showed that the claims sued on had been settled and that the United States had been released from any liability to the plaintiff.

The petition alleges, among other things, "that section 3 thereof does not contain and was not intended to contain any receipt or acknowledgment of any consideration by or in favor of the plaintiff for the use of said railroad property during said six months from January 1 to July 1, 1918;" that the section refers only to other provisions;

and that the "plaintiff gained nothing by the execution of this contract, and by it no rights were lost." The contention is that these allegations are admitted by the demurrer; and that for this and other reasons section 3 can not properly be construed to apply to claims of the character of those sought to be recovered, because these "did not arise out of the contract or because of anything contained in it." The allegations in the petition as to the meaning, application and effect of section 3, being conclusions of law, are not admitted by the demurrer. *United States* v. *Ames*, 99 U. S. 35, 45; *Chicot County* v. *Sherwood*, 148 U. S. 529, 536; *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. The legal effect of the instrument remains that which its language imports. *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S. 569, 578. The contract here in question appears to have been carefully drawn. It is the standard form short-line or co-operative contract said to have been executed by more than a hundred railroads.[1] The language employed in section 3 to embody the agreement for settlement and release of claims is so clear and comprehensive as to leave on its face no room for construction. *United States* v. *Wm. Cramp & Sons Co.*, 206 U. S. 118, 128. And we do not find in any other part of the contract any provision which prevents the application of the release clause to the claims here in suit.

There is no contention that the contract as written does not express the actual agreement, nor a prayer that, because of mutual mistake, it should be reformed. The petition contains allegations which indicate that originally it was intended to challenge the validity of the contract because of duress, lack of consideration, and want of power in the Director General to enter into the same.

[1] For the form of the cooperative contract, see United States Railroad Administration, Director General of Railroads, Bulletin No. 4 (revised), 1919, p. 80; Report of the Director General, 1924, pp. 36–38.

But the plaintiff's brief declares that the sole question before the Court is whether section 3 of the contract is a settlement or waiver of the claim in suit. And more specifically: "It is not alleged nor now claimed that the contract was wholly and absolutely void because of total lack of consideration, or because the same was executed under forceable and legal duress." Any claim based on a lack of authority in the Director General is clearly unfounded.

There is in the brief a suggestion that the lower court erred in giving effect to section 3 because "the contract was set out as an exhibit to the petition not as a part thereof, but merely for the purpose of showing to the court that the cause of action set out in the petition . . . [was] entirely independent of and arose outside of the contract itself." The suggestion is unsubstantial. Ordinarily the defense of release or accord and satisfaction must be pleaded in bar. But where the fact appears either in the body of the petition, or from an exhibit annexed, the defense may be availed of on demurrer. Compare *Randall* v. *Howard*, 2 Black, 585, 589; *McClure* v. *Township of Oxford*, 94 U. S. 429, 433; *Speidel* v. *Henrici*, 120 U. S. 377, 387.

*Affirmed.*